



# Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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## **Memorandum**

**Date:** March 24, 2023

**To:** Richard Conescu, Chair, & Members, Zoning Board of Adjustment

**From:** Colleen Olsen, Assistant Planner

**Subject:** **526 DW, LLC (petitioner/owner)** – Variance under Section 17.10.3 (b) of the Zoning Ordinance to permit placement of a ground sign to be setback 3 feet from the edge of a public right-of-way whereas a 20 foot setback is required. The parcel is located at 526 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Elderly Housing Overlay Districts and the Wellhead Protection Area. Tax Map 5D-2 Lot 001. Case # ZBA 2023-13.

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The following information is provided to aid in your consideration of the above referenced case. Additional background and application materials are included in your packet.

### **Background & Project Description**

**If the Board denies the variances in either Case 2023-11 or 2023-12, then this petition is unnecessary and should be deemed moot by the Board.**

Map 5D-2, Lot 001 is located at 526 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Elderly Housing Overlay Districts and the Wellhead Protection Area. The property is approximately 8.33 acres in size and is serviced by public (MVD) water and sewer. The site is the location of Vault Motor Storage and is abutted by the STA school bus operations facility to the east, Eversource property to the west, commercial and multifamily residential to the south, and the FE Everett Turnpike to the north.

Please review the associated petitions for this property, as each variance request is associated with, and dependent upon, approval of the related petitions.

The petitioner seeks a variance to permit placement of a ground sign to be located 3 feet from the edge of a public right-of-way whereas a 20 foot setback is required.

### **Standard of Review**

It is the burden of the petitioner to demonstrate that the five criteria for the granting of the Variance under Section 17.10.3 (b) of the Zoning Ordinance to permit placement of a ground sign to be setback 3 feet from the edge of a public right-of-way whereas a 20 foot setback is required.

As a reminder, for a variance to be legally granted the petitioner must demonstrate that **all five** of the statutory criteria for granting a variance have been met. The statutory criteria, and an explanation of what each criterion is seeking to establish/what the petitioner must prove as part of

their response, as prepared by the New Hampshire Office of Planning & Development, is located on the last page of this memo.

**Staff Guidance on Potential Motions**

Staff cannot make specific recommendations for action to the Zoning Board of Adjustment due to the Board's status as a quasi-judicial body. However, staff suggests the Board use one of the following templates for a motion to grant or deny the variance, depending whichever course of action the Board deems appropriate:

**Potential Motion to DENY the Variance:**

***"I make a motion to deny the Variance under Section 17.10.3 (b) of the Zoning Ordinance to permit placement of a ground sign to be setback 3 feet from the edge of a public right-of-way whereas a 20 foot setback is required, for the following reasons:***

- ***(List the specific reasons why the Board felt the petition failed to meet all five statutory criteria, not just the criteria the Board felt were not met)"***

**Potential Motion to GRANT the Variance:**

***"I make a motion that the Board finds the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 17.10.3 (b) of the Zoning Ordinance to permit placement of a ground sign to be located 3 feet from the edge of a public right-of-way whereas a 20 foot setback is required."***

Ec: 526 DW LLC  
Building Department Staff  
Fire Prevention Staff  
Assessing Department Staff  
Cc: Zoning Board File

### **VARIANCE CRITERIA GUIDELINES**

<b>Statutory Requirements (RSA 674:33, I(b))</b> <i>PETITIONER MUST SATISFY <u>ALL</u> OF THE FOLLOWING</i>	<b>Explanation</b>
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure “public rights.”  As it is in the public’s interest to uphold the spirit of the ordinance, these two criteria are related.
2. The spirit of the ordinance is observed.	
3. Substantial justice is done.	The benefit to the petitioner should not be outweighed by harm to the general public.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The Board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship can be shown in either of two ways:  First is to show that because of special conditions of the property that distinguish it from other properties in the area:  (a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; and  (b) The proposed use is a reasonable one.  <u>Alternatively</u> , unnecessary hardship exists if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.	The petitioner must establish that the property is burdened by the zoning restriction in a manner that is distinct from other land in the area.  (a) Determine the purpose of the zoning restriction in question. The petitioner must establish that, because of the special conditions of the property, the restriction, as applied to the property, does not serve that purpose in a “fair and substantial” way.  (b) The petitioner must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.  <u>Alternatively</u> , the petitioner can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. <b>If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.</b>

Source: NH Office of Planning & Development Zoning Board Handbook, 2021 edition